

**Cheah Eng Huat & Ors v Pengarah Tanah dan Galian Pulau
Pinang** A

HIGH COURT (PENANG) — JUDICIAL REVIEW NO PA-25-19-04 OF
2019 B
AMARJEET SINGH JC
5 JANUARY 2021

Civil Procedure — Judicial review — Certiorari — Land Acquisition C
— *Whether the Director of Land and Mines was correctly named as a party*
— *Whether there was a failure to serve the cause papers to other parties*
— *Whether decision was illegal and irrational*

This was an application for judicial review involving Lot 172 seeking for: (a) D
an order of certiorari quashing: (i) the ‘Notice that Land is Likely to be Acquired’
dated 24 December 2018 published in the Penang State *Gazette* No 39 (Vol 63
No 1) dated 10 January 2019 under s 4 of the Land Acquisition Act 1960 (‘the
LAA’) (‘the s 4 notice’); (ii) the ‘Declaration of Intended Acquisition’ dated 24
December 2018 published in the Penang State *Gazette* No 40 (Vol 63 No 1) E
dated 10 January 2019 under s 8 of the LAA (‘the s 8 declaration’); and (b) a
declaration that the s 4 notice and that the s 8 declaration published in the
Penang State *Gazette* were null and void. The brief facts of the case was that Lot
172 was registered in the names of the applicant as trustees since at least
14 March 2018 as stated in the registered title. On 10 January 2019, it was F
published in the Penang State *Gazette* (‘the *gazette*’), the s 4 notice and s 8
declaration, both of which carried the date 24 December 2018 under the hand
of the Deputy Director of Land and Mines of the state of Penang, specifically
stated that the acquisition of the land was for the purpose of economic
development under para 3(1)(b) of the LAA to wit an access route. Kay Pride G
Sdn Bhd was a housing developer desirous of developing the lot adjoining Lot
172 and had submitted an application to acquire part of Lot 172 to be made an
access road for the said project to the land administrator who after processing
the application submitted the same to the State Economic Planning Unit. The
State Economic Planning Unit recommended the land be acquired for the said H
purpose and placed the same before the state authority for its decision which
was as stated in the s 8 declaration. The grounds advanced in supporting the
application were as follows: (1) an access route cannot be economic
development; (2) the acquisition for the construction of an access route was to
serve a private purpose and the use of neighboring lands for such private I
purpose was ultra vires s 3(1)(b) of the LAA; (3) such acquisition was illegal,
irrational, unfair, an unreasonable exercise of administrative power and/or
authority and an abuse of administrative power and/or authority; (4) such
acquisition violated, undermined and/or was intentionally done to avoid the

A provisions of Part 28 or specifically ss 387–395 of the National Land Code; and
 (5) such acquisition was done in breach of the rules of natural justice. The
 respondents arguments were as follows: (A) the Director of Lands and Mines
 did not make the decision to acquire the land and therefore was wrongly made
 a party; (B) the proper parties to cite in the instant judicial review were the land
 B administrator and Kay Pride Sdn Bhd and the failure to cite them as parties was
 fatal; and (C) the failure to serve the cause papers on the land administrator and
 Kay Pride Sdn Bhd was fatal and in breach of O 53 r 4(2) of the Rules of Court
 2012; and (4) the land acquisition was properly made in accordance with the
 law and therefore valid and effective.

C
Held, application allowed:

- (1) The Director fo Lands and Mines was correctly cited as a party. The court
 was mindful that the decision to acquire the land was made by the state
 D authority under s 8(1) of the LAA and generally the decision-maker was
 cited as a party to receive an order of certiorari or declaration. The
 ‘state authority’ was merely a definition as it is interpreted in s 2 of the LAA
 to mean either the Ruler of a State or the Yang di-Pertua Negeri of a State,
 as the case may be. The role of the Director of Lands and Mines must be
 E considered vis a vis the state authority. It was important to note the
 applicants were seeking to quash and declare the s 4 notice and s 8
 declaration respectively. It was crucial to note that the s 4 notice and the
 s 8 declaration were both provided for in the Second Schedule of the LAA
 as Form A and Form D respectively. A careful perusal of Form A and
 F Form D revealed that the person designated to make the said notice and
 the said declaration and caused the same to be published in the *gazette*
 was the state authority. Therefore, the LAA statutorily required the
 Director of Land and Mines of a state to cause to be published in the
 G *gazette* the said Form A and Form D. Seen in this way the Director of
 Land and Mines of the State was by operation of law required to act in the
 name of the state authority (see paras 11–12).
- (2) There was no merit in the argument that the application was defective as
 the land administrator and Kay Pride Sdn Bhd were not made parties to
 H oppose the application, as the application was validly and properly
 brought against the correct respondent. The land administrator and
 Kay Pride did not feature in the s 4 notice and s 8 declaration. The
 applicants did not know of their existence until after affidavits were
 I exhausted for the substantive hearing of the instant application. In any
 event, the decision making process being assailed is that of the state
 authority. The lawful and proper recipient of an order of centiorari and
 declaration sought in the instant application was the Director of Land
 and Mines (see para 16).

- (3) O 53 r 4(2) must be read with Form 110 of the Rules of Court 2012. The party to be served expressly provided in Form 110 were: (a) the respondent named in the title; and (b) all other parties upon whom service has been directed. Thus, apart from the respondent any other party must be a party on whom service had been directed by the court. Such direction can only be made at the conclusion of the leave hearing (see paras 18–20). A
B
- (4) The acquiring authority had misconstrued its statutory powers and the purpose stated in the declaration did not come within s 3(1)(b) of the LAA. The acquisition of part of Lot 172 for the construction of an access route was to serve a private purpose and the use of neighboring lands for such private purpose was certainly ultra vires s 3(1)(b) of the LAA. The acquisition was clearly for the benefit of Kay Pride Sdn Bhd who will privately benefit from the acquisition. Any acquisition that privately benefits a third party was ultra vires s 3(1)(b) of the LAA (see para 31). C
D
- (5) It was also an irrational decision in that a state authority similarly circumscribed would not have arrived at. The state authority had also departed from its own standards ie that an acquisition must not be for the benefit of any corporation and that development of any land must be last and not the first resort. The state authority had therefore acted contrary to law warranting the acquisition as declared in Forms A and D to be moved into this court and quashed (see para 32). E

[Bahasa Malaysia summary]

Ini merupakan permohonan pemohon untuk semakan kehakiman melibatkan Lot 172 memohon untuk: (a) perintah centiorari membatalkan: (i) 'Notis bahawa tanah kebarangkalian tinggi akan diambil' bertarikh 24 Disember 2018 yang diterbitkan di *Gazette* Negeri Pulau Pinang No 39 (Vol 63 No 1) bertarikh 10 Januari 2019 di bawah s 4 Akta Pengambilan Tanah 1960 ('APT') ('notis s 4'); (ii) 'Pengisytiharan Niat Pengambilan' bertarikh 24 Disember 2018 yang diterbitkan dalam *Gazette* Negeri Pulau Pinang No 40 (Vol 63 No 1) bertarikh 10 Januari 2019 di bawah s 8 APT ('pengisytiharan s 8'); dan (b) pengisytiharan bahawa notis s 4 dan pengisytiharan s 8 yang diterbitkan dalam *Gazette* Negeri Pulau Pinang adalah tidak sah dan terbatal. Fakta ringkas kes ini adalah bahawa Lot 172 didaftarkan dalam nama pemohon sebagai pemegang amanah sejak 14 Mac 2018 sepertimana yang tertera di hak milik berdaftar. Pada 10 Januari 2019, ianya diterbitkan di dalam *Gazette* Negeri Pulau Pinang ('*gazette* tersebut'), notis s 4 dan pengisytiharan s 8, yang mana kedua-dua mempunyai tarikh 24 Disember 2018, di bawah tangan Pengarah Tanah dan Galian Negeri Pulau Pinang, menyatakan secara spesifik bahawa pengambilan tanah untuk tujuan pembangunan ekonomi di bawah perenggan 3(1)(b) APT iaitu satu jalan masuk. Kay Pride Sdn Bhd merupakan seorang pemaju hartanah yang berniat untuk memajukan lot di sebelah Lot 172 dan telah memasukkan permohonan untuk mengambil sebahagian F
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- A daripada Lot 172 untuk dibuat sebagai jalan masak untuk projek tersebut kepada pentadbir tanah yang mana selepas memproses permohonan tersebut mengangkat yang sama kepada Unit Perancang Ekonomi Negeri. Unit Perancangan Ekonomi Negeri mengesyorkan agar tanah tersebut diambil untuk tujuan tersebut dan meletakkan perkara yang sama ke otoriti negeri
- B untuk keputusannya yang mana dinyatakan dalam pengisytiharan s 8. Alasan yang dikemukakan dalam menyokong permohonan adalah seperti berikut: (1) satu jalan masuk bukanlah berkembang ekonomi; (2) pengambilan untuk tujuan pembinaan jalan masuk untuk tujuan peribadi dan kegunaan tanah sekelilingnya adalah ultra vires s 3(1)(b) APT; (3) pengambilan sedemikian adalah tidak sah di sisi undang-undang, tidak masuk akal, tidak adil dan satu penggunaan kuasa pentadbiran yang tidak munasabah dan/atau otoriti dan satu penyalahgunaan kuasa dan/atau otoriti; (4) pengambilan sedemikian melanggar, menjejaskan dan/atau dilakukan dengan sengaja untuk mengelak peruntukan Bahagian 28 atau secara spesifik ss 387–395 Kanun Tanah Negara; dan (5) pengambilan sedemikian adalah bertentangan dengan prinsip keadilan asasi. Hujahan responden adalah seperti berikut: (A) Pengarah Tanah dan Galian tidak membuat keputusan untuk mengambil tanah tersebut, oleh yang demikian, telah dinamakan sebagai pihak secara salah; (B) pihak yang sepatutnya disebut dalam permohonan ini adalah pentadbir tanah, Kay Pride Sdn Bhd dan kegagalan untuk membuat mereka sebagai pihak adalah *fatal*; dan (C) kegagalan untuk menyerahkan kertas kausa kepada pentadbir tanah dan Kay Pride Sdn Bhd adalah *fatal* kerana bertentangan dengan A 53 k 4(2) Kaedah-Kaedah Mahkamah 2012; dan (D) pengambilan tanah dibuat mengikut keperluan undang-undang dan oleh itu adalah sah dan berkuatkuasa.
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Diputuskan, membenarkan permohonan:

- (1) Pengarah Tanah dan Galian telah disebut sebagai pihak dengan betul. Mahkamah ini mengambil kira bahawa keputusan untuk mengambil tanah telah dibuat oleh otoriti negeri di bawah s 8(1) APT dan secara amnya pembuat keputusan disebut sebagai pihak untuk mendapatkan satu perintah centiorari atau pengisytiharan. Otoriti negeri melalui tafsiran s 2 APT bermaksud sama ada Pemerintah Negeri atau Yang di-Pertua Negeri satu negeri berdasarkan keadaan. Peranan Pengarah Tanah dan Galian haruslah diambil kira sebagai otoriti negeri. Ianya penting untuk mengingatkan bahwa pemohon memohon untuk membatalkan dan mengisytiharkan notis s 4 dan pengisytiharan s 8. Ianya penting untuk mengambil kira bahawa notis s 4 dan pengisytiharan s 8 kedua-duanya diperuntukkan dalam Jadual Kedua APT sebagai Borang A dan Borang D. Penelitian Borang A dan Borang D menunjukkan bahawa individu yang diberi kuasa untuk membuat notis dan pengisytiharan tersebut dan menyebabkannya diterbitkan adalah otoriti negeri. Oleh itu, APT, secara statutori memerlukan Pengarah
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- Tanah dan Galian untuk menyebabkan penerbitan dalam *gazette* Borang A dan Borang D. Apabila dilihat sedemikian, Pengarah Tanah dan Galian Negeri, melalui peruntukan undang-undang bertindak atas nama otoriti negeri (lihat perenggan 11–12) A
- (2) Tiada merit dalam hujahan bahawa permohonan adalah cacat kerana pentadbir tanah dan Kay Pride Sdn Bhd tidak dibuat sebagai pihak untuk menentang permohonan, kerana permohonan ini telah secara sah dan teratur dibawa kepada responden yang betul. Pentadbir tanah dan Kay Pride tidak timbul dalam notis s 4 dan pengisytiharan s 8. Pemohon tidak mengetahui kewujudan mereka sehingga kesemua affidavit selesai difailkan untuk pendengaran substantif permohonan ini. Dalam apa keadaan, keputusan yang dicabar adalah otoriti negeri. Penerima sah dan tepat perintah centiorari dan pengisytiharan yang dipohon adalah Pengarah Tanah dan Galian (lihat perenggan 16). B
- (3) A 53 k 4(2) perlu dibaca dengan Borang 110 Kaedah-Kaedah Mahkamah 2012. Pihak yang perlu diserahkan yang dinyatakan dalam Borang 110 adalah: (a) responden yang dinamakan dalam tajuk; dan (b) semua pihak lain yang mana penyerahan telah diperintahkan. Oleh itu, selain daripada responden mana-mana pihak lain yang perlu menjadi pihak yang menerima serahan seperti diperintahkan oleh mahkamah. Perintah sedemikian hanya boleh dibuat di pengakhiran pendengaran permohonan untuk izin (lihat perenggan 18–20). C
- (4) Otoriti yang menerima telah salah anggap kuasa statutorinya dan tujuan yang dinyatakan dalam pengisytiharan tidak termasuk dibawah s 3(1)(b) APT. Pengambilan sebahagian daripada Lot 172 untuk pembinaan jalan masuk untuk tujuan peribadi dan kegunaan tanah sekeliling adalah jelas ultra vires s 3(1)(b) APT. Pengambilan tersebut adalah untuk kepentingan Kay Pride Sdn Bhd yang akan menerima faedah secara peribadi daripada pengambilan tersebut. Apa-apa pengambilan yang memberi faedah peribadi kepada pihak ketiga adalah ultra vires s 3(1)(b) APT (lihat perenggan 31). D
- (5) Ianya adalah satu keputusan yang tidak masuk akal yang mana satu otoriti negeri yang mempunyai batasan yang sama tidak akan capai. Otoriti negeri juga telah meninggalkan standard mereka sendiri iaitu bahawa satu pengambilan tidak boleh untuk keuntungan mana-mana syarikat dan pembangunan mana-mana tanah haruslah menjadi pilihan terakhir dan bukan pertama. Otoriti negeri oleh itu telah bertindak bertentangan dengan undang-undang dan menyebabkan pengambilan seperti mana diisytiharkan dalam Borang-Borang A dan D dibatalkan (lihat perenggan 32).] E
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A Cases referred to

Ahmad bin Saman v Kerajaan Negeri Kedah [2003] 4 MLJ 705; [2004] 1 CLJ 211, CA (refd)

Bartrum v Manurewa Borough [1962] NZLR 21, SC (refd)

B

Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] 5 MLJ 141; [2018] 7 CLJ 403, FC (refd)

Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64; [1987] 2 CLJ 342 (refd)
Kuala Lumpur Kepong Berhad v Pentadbir Tanah Jajahan Tanah Merah & Anor [2015] MLJU 2150; [2015] 6 CLJ 1, CA (refd)

C

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307; [2009] 6 CLJ 405, FC (refd)

Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, Proposed Intervenor) [2004] 3 MLJ 301; [2004] 3 CLJ 131, CA (refd)

D

Ottavio Quattrocchi v Menteri Dalam Negeri, Malaysia & Ors [2001] 6 MLJ 561, HC (refd)

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35, FC (refd)

E

Petroleum Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438, HL (refd)

F**Legislation referred to**

Extradition Act 1992 ss 3, 12(1), (3), 19

Federal Constitution art 13(1)

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Land Acquisition Act 1960 ss 2, 3, 3(1), (1)(b), 3(4), 4, 8, 8(1), (3), Second Schedule, Part 28, Forms A, D

National Land Code ss 5, 12, 16(2), 387, 388, 389, 390, 391, 392, 393, 394, 395

Rules of Court 2012 O 53 rr 4(2), 8(1), Form 110

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Thayalan (Thayalan & Assoc) for the applicant.

Siti Hafiza Jaafar (Senior Federal Counsel, Pejabat Penasihat Undang-Undang Negeri Pulau Pinang) for the respondent.

Amarjeet Singh JC:**I****INTRODUCTION**

[1] On 8 October 2020, I granted the applicant the following orders in the instant judicial review proceedings:

- (a) an order of certiorari quashing the 'Notice that Land is likely to be Acquired' dated 24 December 2018 concerning Lot 172, Seksyen 2, Bandar Jelutong, Daerah Timur Laut, Pulau Pinang ('Lot 172') published in the Penang State *Gazette* No 39 (Vol 63 No 1) dated 10 January 2019 under s 4 of the Land Acquisition Act 1960 ('the LAA'); A
 - (b) an order of certiorari quashing the 'Declaration of Intended Acquisition' dated 24 December 2018 concerning Lot 172 published in the Penang State *Gazette* No 40 (Vol 63 No 1) dated 10 January 2019 under s 8 of the LAA; and B
 - (c) a declaration that the 'Notice that land is likely to be acquired' under s 4 of the LAA dated 24 December 2018 ('the s 4 notice') and that the 'Declaration of Intended Acquisition' dated 24 December 2018 under s 8 of the LAA ('the s 8 declaration') concerning Lot 172 published in the Penang State *Gazette* are null and void. C
- D

[2] The reasons for my decision are stated below.

BACKGROUND

[3] Lot 172 is registered in the names of the applicants as trustees at least since 14 March 2018 as stated in the registered title. On 10 January 2019, it was published in the Penang State *Gazette* ('the *gazette*') the s 4 notice and the s 8 declaration, both of which carry the date 24 December 2018, under the hand of the Deputy Director of Land and Mines of the state of Penang. The s 4 notice and the s 8 declaration both specifically state the purpose of the acquisition as follows:

economic development under paragraph 3(1)(b) of the Land Acquisition Act 1960 (Act 468) *to wit* an Access Route.

[4] Section 3(1)(b) of the LAA reads as follows:

The State Authority may acquire any land which is needed — by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public.

[5] A s 4 notice is in Form A and is published in the *gazette* upon the state authority being satisfied that any land in any locality in the state is likely to be needed for any of the purposes referred to in s 3 of the LAA. And when the state authority decides that any land is in fact needed for any of the purposes referred to in s 3, a s 8 declaration which is in Form D must be published in the *gazette*. According to s 8(3) of the LAA such declaration is conclusive evidence that all the land referred to in Form D is needed for the purpose specified therein: in

A the instant case the land is acquired for ‘economic development’.

[6] The applicants filed the application for leave to commence judicial review for the said reliefs on 8 April 2019. Leave was granted on 13 May 2019 and the matter was then fixed for the substantive application vide notice of hearing dated 13 May 2019. The grounds advanced for the said reliefs can be summarised as follows:

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- (a) an ‘access route’ on part of Lot 172 cannot be ‘economic development’ under the s 3(1)(b) of the LAA;
- C
- (b) the acquisition for the construction of an access route is to serve a private purpose and the use of neighbouring lands for such private purpose is ultra vires s 3(1)(b) of the LAA;
- D
- (c) the acquisition for the construction of an access route is to serve a private purpose and the use of neighbouring lands for such private purpose is *illegal, irrational*, unfair, an unreasonable exercise of administrative power and/or authority and an abuse of administrative power and/or authority;
- E
- (d) the acquisition for the construction of an access route is to serve a private purpose and the use of neighbouring lands for such private purpose violates, undermines and/or was intentionally done to avoid the provisions of Part 28, or specifically ss 387 to 395 of the National Land Code; and
- F
- (e) the acquisition for the construction of an access route is to serve a private purpose and the use of neighbouring lands for such private purpose was done in breach of the rules of natural justice.

G THE RESPONDENT’S ARGUMENTS

[7] The respondent’s opposition to the application as gleaned from the affidavits filed on behalf of the Director of Lands and Mines are as follows:

- H
- (a) the Director of Lands and Mines did not make the decision to acquire the land and was therefore wrongly made a party in the instant judicial review application;
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- (b) the proper parties to cite in the instant judicial review application are the Land Administrator and Kay Pride Sdn Bhd and the failure to cite them as parties is fatal;
- (c) the failure to serve the cause papers on the Land Administrator and Kay Pride Sdn Bhd is fatal being in breach of O 53 r 4(2) of the Rules of Court 2012; and

- (d) the land acquisition was properly made in accordance with the law and therefore valid and effective. A

[8] The respondent in his affidavit in support stated that Kay Pride Sdn Bhd, a housing developer was desirous of building two 33 storey buildings on Lot 10044 dan one 34 storey building on Lot 10045 ('the project') which are adjoining Lot 172. It was stated that Kay Pride Sdn Bhd submitted an application to acquire part of Lot 172 to be made an access road for the said project to the Land Administrator who after processing the application submitted the same to the State Economic Planning Unit pursuant to s 3(4) of the LAA. B C

[9] The respondent further stated that the State Economic Planning Unit recommended that the land be acquired for the purpose stated therein. The land administrator transmitted the application and necessary documents together with the State Economic Planning Unit's recommendations to the Director of Lands and Mines who placed the same before the state authority for its decision. The state authority made the decision which was as stated in the s 8 declaration. D

THE WRONG PARTY CITED ISSUE E

[10] In my mind the issue is whether the office of the Director of Lands and Mines is the correct party to be named as respondent in a judicial review application seeking to quash or declare as null and void a decision of the state authority that a specified land is to be acquired for the purposes of s 3(1) of the LAA. If the answer is in the negative the corollary issue is the effect of wrongly naming the office of the Director of Lands and Mines. F

[11] In my considered opinion the Director of Lands and Mines was correctly cited as a party. I am mindful that the decision to acquire the land was made by the state authority under s 8(1) of the LAA and generally the decision-maker is cited as a party to receive an order of certiorari or declaration. But, the 'state authority' is merely a definition of art as it is interpreted in s 2 of the LAA to mean either the Ruler of a state or the Yang di-Pertua Negeri of a state, as the case may be. In the case of the state of Penang it is the Yang di-Pertua Negeri. And secondly, the role of the Director of Lands and Mines must be considered vis a vis the state authority. G H

[12] In this regard it is important to note that the applicants are seeking to quash and declare the s 4 notice and s 8 declaration respectively. Both these documents are issued at the instance of the Director of Land and Mines as evidenced in the *gazette*. It is crucial to further note that the s 4 notice and the s 8 declaration are both provided for in the Second Schedule of the LAA as I

- A Form A and Form D respectively. A careful perusal of Form A and Form D reveals that the person designated to make the said notice and the said declaration and cause the same to be published in the *gazette* is the state director. The ‘state director’ is defined in s 2 of the LAA to mean ‘a State Director of Land and Mines appointed under the state land law and includes a
- B Deputy State Director of Land and Mines’. Therefore, the LAA statutorily requires the Director of Land and Mines of a state to cause to be published in the *gazette* the said Form A and Form D. Seen in this way the Director of Land and Mines of the state is by operation of law required to act in the name of the
- C state authority or more precisely the Ruler of a State or the Yang di-Pertua Negeri of a State. Thus, where a decision to acquire land is challenged the proceedings for certiorari and/or declaration should be brought against the office of the Director of Lands and Mines and consequently, the contents of his affidavit, if any, would clearly reflect any decision of the state authority, as he represents the state authority, that is, the Ruler of a State or the Yang di-Pertua
- D Negeri of a State.

[13] To make it absolutely clear it would be ideal if the LAA had a provision similar to s 16(2) of the National Land Code (‘the NLC’) which reads as follows:

- E Any action, suit or proceeding relating to land in which it is sought to establish any liability on part of the State Authority shall be brought in the name of the State Director in the name of his office.
- F and, ‘state director’ according to s 5 of the NLC means the Director of Lands and Mines for a state appointed under s 12 of the NLC and includes a Deputy Director of Lands and Mines appointed thereunder’. It is important to further observe that the Director of Lands and Mines for a state under the LAA is the person appointed under state land law. The state land law for the state of
- G Penang and other states is the NLC. Thus, the Director of Lands and Mines of a state is one and the same office of the Director of Lands and Mines for a state appointed under s 12 of the NLC.

- H [14] In this regard I am supported by the decision of the Court of Appeal in *Kuala Lumpur Kepong Berhad v Pentadbir Tanah Jajahan Tanah Merah & Anor* [2015] MLJU 2150; [2015] 6 CLJ 1 which held that the Director of Lands and Mines and not the State Authority is a proper party in such proceedings as in the instant application. In that case the landowner challenged the validity of the acquisition of its land under the LAA by way of judicial review and named
- I the Director of Lands and Mines for the state of Kelantan as a party in the proceedings. One of the grounds of the High Court for dismissing the application was that the state authority and not the Director of Lands and Mines must be made a party in the proceedings. The Court of Appeal reversed the High Court holding that under s 16(2) of the National Land Code any

proceeding relating to land in which it is sought to establish any liability on the part of the state authority shall be brought against the state director which by definition is the Director of Land and Mines for the State. The court further stated as follows:

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Even on the supposition that we are wrong on the construction of s 16 of the NLC 1965, we take the view the High Court should have directed the appellant to add the State Authority as a party to the suit. (See *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699; [2000] 3 CLJ 666). In matters relating to judicial review and/or issues relating to constitutional issues, the courts should be slow to dismiss an action on the grounds that the right party was not named.

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[15] The Court of Appeal in *Kuala Lumpur Kepong Bhd* were of the view that even if the Director of Land and Mines was a wrong party the mistake is not fatal as the Court of Appeal opined that in matters relating to judicial review and/or issues relating to constitutional matters such as deprivation of land, the courts should be slow to dismiss an action on the grounds that the right party was not named.

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[16] On the issue that the instant application is defective as the land administrator and Kay Pride Sdn Bhd were not made parties to oppose the application. In my judgment there is no merit in this argument for the instant application is validly and properly brought against the correct respondent. First of all the land administrator and Kay Pride Sdn Bhd do not feature in the s 4 notice and s 8 declaration. The applicants did not know of their existence until after the affidavits were exhausted for the substantive hearing of the instant application. Secondly, in any event the decision making process being assailed is that of the state authority. The lawful and proper recipient of an order of certiorari and declaration sought in the instant application is the Director of Land and Mines as shown above. Thirdly, O 53 r 8(1) of the Rules of Court 2012 provides the avenue to the land administrator and Kay Pride Sdn Bhd if they want to be heard in opposition to the instant application. The rule provides as follows:

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Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears to the Judge to be a proper person to be heard may be heard notwithstanding that he has not been served with the cause papers in the matter.

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Thus, the land administrator and Kay Pride Sdn Bhd if that so desire must satisfy the judge that they are a proper person to be heard in opposing the instant application.

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A FAILURE TO SERVE THE CAUSE PAPERS ON THE LAND ADMINISTRATOR AND KAY PRIDE SDN BHD

B [17] The respondent submitted that the instant application is defective for the failure to serve the cause papers on the land administrator and Kay Pride Sdn in accordance with O 53 r 4(2) of the Rules of Court 2012 as they are parties directly affected by the orders that would be given in the instant application.

C [18] I disagree. Firstly, O 53 r 4(2) must be read with Form 110 of the Rules of Court 2012. The rule reads as follows:

D Upon extraction of the sealed copy of Form 110, the applicant shall serve a copy of the same together with a copy of the statement and all affidavits in support on *all persons directly affected by the application* not later than fourteen days before the date of hearing specified in the Form 110.

E [19] A perusal of Form 110 reveals that it is a notice stating that leave to apply for judicial review has been granted and that the substantive application for the relief sought is to be heard in open court on the date and time specified. It further informs the party being served to take notice that a copy of the statement and all affidavits in support are also served on that party. The party to be served expressly provided in Form 110 are:

- F (1) the respondent named in the title; and
(2) *all other parties upon whom service has been directed.*

G Thus, apart from the respondent any other party must be a party on whom service has been directed by the court. Such direction can only be made at the conclusion of the leave hearing.

H [20] This court did not direct that service on any other person apart from the respondent be made. There was no reason to do so. It is trite that the proper respondent where certiorari is sought is the person or body who made the impugned decision, in other words, the decision-maker. If a declaration is also sought in an application for judicial review, as is sought in the instant application, the applicant must secure *a proper contradictor*, that is to say, someone presently existing who has a true interest to oppose the declaration has sought (see Zamir's, *The Declaratory Judgment* (3rd Ed) at p 137; *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at p 448; *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64; [1987] 2 CLJ 342; and *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141; [2018] 7 CLJ 403). That person on the facts and circumstances of this case is the Director of Lands and Mines.

[21] Secondly, the case of *Ottavio Quattrocchi v Menteri Dalam Negeri, Malaysia & Ors* [2001] 6 MLJ 561 cited by the respondent is of no assistance. The case did not decide that the failure to serve the cause papers on all other persons directly affected by the application is fatal under O 53 r 4(2) of the Rules of Court 2012. In that case the Union of India made a request to the Government of Malaysia for the extradition of the applicant, Ottavio Quattrocchi to India as a fugitive criminal. The Minister of Home Affairs gave a *special direction* under s 3 of the Extradition Act 1992 that the Act shall apply to India in relation to the extradition thereto of the applicant, and, on a requisition by the Union of India under s 12(1), also made an order under s 12(3) of the Extradition Act 1992 authorising the magistrate to issue a warrant for the apprehension of the applicant, which the magistrate accordingly did. The applicant was duly apprehended and brought before the sessions court to face extradition proceedings under s 19 of the Extradition Act 1992. The applicant, pending the hearing of the extradition proceedings applied for and obtained leave to apply for an order of certiorari to quash the special direction and order of the minister and the warrant of apprehension of the magistrate. In that case, like the instant application, only the parties whose decision was sought to be impugned were cited as respondents. *The substantive application could not be heard as the Union of India had made an application to be added as a party to the proceedings.* The High Court held that the Union of India would be 'directly affected' by the judicial review application and allowed the application to be added as a party to the said judicial review proceedings.

[22] Thirdly, and most importantly as pointed out above if there is any party desirous to be heard in opposition to the application, such party is entitled to apply pursuant to O 53 r 8(1) of the Rules of Court 2012 to be heard notwithstanding such person has not been served with the cause papers. This means that the land administrator or Kay Pride Sdn Bhd are desirous of being heard they should apply to this court to be heard under the abovementioned rule. As pointed out in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405 the person applying under the rule must show that he has a direct interest to be heard in opposition of the application. Zulkefli Makinudin FCJ enunciation of the law is instructive:

[16] Based on the above well laid-out provisions in the RHC it is evident that the Rules Committee had intended to establish a specific framework for the determination of applications for judicial review. In my view O 53 of the RHC was specifically drafted for that purpose. ... It is my judgment that O 53 r 8(1) of the RHC specifically caters to persons claiming an interest in the proceedings and who wish to be heard in opposition.

[24] I am of the view the use of the phrase 'proper person' in O 53 r 8(1) of the RHC must be read as referring to persons with a *direct interest*. In this regard the test for joinder as a party in judicial review was considered by the House of Lords in *R v Rent Officer Service, ex parte Muldoon*; *R v Rent Officer Service, ex parte Kelly* [1996] 3 All

A ER 498 . It was concluded in that case that an indirect interest, even on the part of the Secretary of State, was not sufficient to justify joinder. I am of the view the same test would apply to the appellant in the present case.

B [23] In the circumstances I find no merit in the preliminary point raised by the respondent.

WHETHER THE DECISION IS TAINTED WITH ILLEGALITY AND IRRATIONALITY

C [24] I begin with the governing principles on the relief of certiorari. The remedy is obtained pursuant to the supervisory jurisdiction of the High Court which permits the High Court to quash decisions of tribunals and bodies on the established grounds of *procedural impropriety*, *illegality*, *irrationality* and recently *proportionality*. Generally, the review by the High Court is concerned, not with the decision, but with the decision making process. This is especially so where a decision is challenged on the ground of *procedural impropriety*. But where decisions are open to challenge on grounds of *illegality* and *irrationality*, the court is permitted to scrutinise such decisions not only for process, but also for substance. Under such grounds the merits must be looked into for how else can the court review the impugned decision: an intervention on the ground of *illegality* is available if it was shown that the decision maker had misconstrued any provision of a statute or misapplied a principle of general law while an intervention on the ground of *irrationality* is available if it is shown that the conclusion reached is one that no reasonable tribunal would make on the facts or where the decision maker had taken into consideration irrelevant matters and omitted to take into account relevant matters. However the court must be vigilant as to not to treat the review as an appeal (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625).

H [25] The key provision in the center of dispute before this court is s 3(1)(b) of the LAA. It provides that the state authority may acquire any land which is needed by a corporation for any purpose which in the opinion of the state authority is beneficial to the economic development:

- (a) of Malaysia;
- I (b) of any part of Malaysia;
- (c) to the public generally; or
- (d) any class of the public.

Thus, the purpose could be anything including a proposed housing accommodation but in the opinion of the state authority, is beneficial to the economic development of the country or to the state concerned or to the public or any class of public. In such cases if land within the vicinity of the targeted area is needed to carry out such project or development, the state authority is authorised to acquire such land.

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[26] Thus, the provision confers a very wide discretion on the state authority to acquire any land needed by other parties provided that the purpose of the acquisition would benefit the economic development as stated above. Whether the acquisition would be beneficial for the economic development is within the discretion of the state authority. But such discretion is not unfettered. In line with the principles of judicial review, the court will not, unlike in an appeal, review the merits or correctness of the decision but only consider whether the decision was made in accordance with law and not tainted with *illegality* and/or *irrationality*. In *Ahmad bin Saman v Kerajaan Negeri Kedah* [2003] 4 MLJ 705; [2004] 1 CLJ 211, the Court of Appeal held a declaration in Form D pursuant to s 8(1) of the LAA may be challenged on any of the following grounds:

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- (a) that the acquiring authority has misconstrued its statutory powers;
- (b) that the purpose stated in the declaration does not come within s 3(1) of the LAA;
- (c) where it can be shown that the acquiring authority has acted in bad faith; or
- (d) that the acquiring authority has acted contrary to the law.

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[27] Since the object or purpose of the Act is to empower the state to deprive an owner of his immovable property in exchange for fair and reasonable compensation courts require the acquiring authority to act strictly in accordance with the provisions of the LAA. This is in line with art 13(1) of the Federal Constitution where any deprivation of property must be in accordance with law (see Gopal Sri Ram JCA in *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, Proposed Intervenor)* [2004] 3 MLJ 301; [2004] 3 CLJ 131.

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[28] The Federal Court established in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35 that:

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Every exercise of statutory power must not only be in conformity with the express words of the Statute but above all must also comply with certain implied legal requirements. The court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross

A unreasonableness (*de Smith's* (4th Ed) p 323; and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*).

B [29] In my mind the issue in the instant application is whether the state authority's decision is tainted with *illegality* and/or *irrationality*. The affidavit by the Director of Lands and Mines contain the recommendations by the State Economic Planning Unit which were taken into consideration by the state authority in making the decision which formed the basis for the s 8 declaration. The reasons given in the original text are as follows:

C (a) peguam negara melalui surat JPN(R) 152/13/6/4/2 Jilid 7 bertarikh 17 June 2005, telah menyatakan bahawa penggunaan s 3(1)(b) Akta Pengambilan Tanah 1960 (Akta 486) adalah terhad untuk manfaat kepada pembangunan ekonomi Malaysia atau sebahagian daripadanya atau manfaat orang awam secara umumnya atau kepada suatu kelas orang awam sahaja dan bukannya untuk manfaat mana- mana syarikat, badan atau organisasi tertentu dan pengambilan tanah haruslah menjadi pilihan terakhir dan bukannya pilihan pertama dalam melaksanakan pembangunan mana-mana tanah.

E (b) tujuan pengambilan tanah tersebut adalah untuk laluan awam bagi akses keluar masuk ke Lot 10044 dan 10045 (lot lama 2708), Seksyen 2, Bandar Jelutong, Daerah Timur Laut yang akan dibangunkan 2 blok Pangsapuri 33 Tingkat di atas lot 10044 dan 1 blok Pangsapuri 34 tingkat di atas Lot 10045.

F (c) pembinaan jalan tersebut akan memberi manfaat untuk jangka masa panjang di mana ia dapat membantu mengurangkan kesesakan lalulintas di kawasan tersebut dengan mengambil kira pertambahan populasi penduduk dan bilangan kenderaan pada masa yang akan datang. Cadangan pengambilan tanah tersebut perlu memastikan syarat-syarat yang ditetapkan oleh Jabatan-Jabatan Teknikal dipatuhi sepenuhnya oleh pemohon dan jalan tersebut hendaklah diserahkan semula kepada kerajaan Negeri apabila ia siap kelak.

H [30] To recap the s 8 declaration in Form D states that part of Lot 172 is needed for economic development to wit an access route. This begs the question an access route to what exactly? It turns out that the access route is needed by Kay Pride Sdn Bhd, a housing developer who intends to build housing accommodation in two 33 storey buildings on Lot 10044 dan one 34 storey building on Lot 10045 on lands which are adjoining Lot 172. The access route is in substance and fact of gaining ingress and egress to buildings which are being built by a private corporation for profit. Although the access route once built is required to be surrendered to the state the purpose of the road is in essence to facilitate a private project. It certainly is not for the economic development of the country or part of the country, or the public generally or any class of the public.

[31] In my considered opinion the acquiring authority has misconstrued its statutory powers and the purpose stated in the declaration does not come within s 3(1)(b) of the LAA. The acquisition of part of Lot 172 for the construction of an access route is to serve a private purpose and the use of neighboring lands for such private purpose is certainly ultra vires s 3(1)(b) of the LAA. The acquisition is clearly for the benefit of Kay Pride Sdn Bhd who will privately benefit from the acquisition. Any acquisition that privately benefits a third party is ultra vires s 3(1)(b) of the LAA. In *Bartrum v Manurewa Borough* [1962] NZLR 21 the court held that:

It is ultra vires a local authority to take land under the Public Works Act from a private person to provide another private person with sufficient good faith for the purpose of the Municipal Corporations Act 1954 *but instead of promoting the public benefit (except in an indirect manner) is promoting the interest of the owner.*

[32] It is also an *irrational* decision in that a state authority similarly circumscribed would not have arrived at. the state authority has also departed from its own standards ie that an acquisition must not be for the benefit of any corporation and that development of any land must be last and not the first resort. The state authority has therefore acted contrary to law warranting the acquisition as declared in Forms A and D to be moved into this court and quashed. In the upshot I allowed the reliefs sought by the applicants.

Application allowed.

Reported by Izzat Fauzan

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